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No. 09-325

In the Supreme Court of the United States

ALEXANDRE ARONOV, PETITIONER

v.

JANET NAPOLITANO,
SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING

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Petitioner respectfully seeks reconsideration of this Court's decision to deny certiorari in this case in light of its decision to grant certiorari on a substantially similar question in *Hardt* v. *Reliance Standard Life Insurance Co.*, No. 09-448 (cert. granted Jan. 15, 2010). Consistent with the Court's past practice, petitioner requests that the Court hold this petition for rehearing pending its decision in *Hardt*, then dispose of the petition accordingly.

1. This case presents the question whether an applicant for naturalization who obtains a court-ordered remand in an action under 8 U.S.C. 1447(b) so that his application for naturalization can be granted is a "prevailing party" who is entitled to attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A).

The Court considered the petition for certiorari in this case at its January 15 Conference and issued an order denying certiorari on January 19. At the same Conference, however, the Court considered and granted the petition for certiorari in *Hardt*. The Court granted review in that case on two questions presented; first, whether a plaintiff in an action under the Employee Retirement Income Security Act of 1974 (ERISA) must be a "prevailing party" in order to obtain attorney's fees under ERISA's fee-shifting provision, 29 U.S.C. 1132(g)(1), and second, whether an ERISA plaintiff who obtains a court-ordered remand, and thereafter receives benefits, is entitled to attorney's fees under that provision. See Pet. at i-ii, *Hardt*, *supra*.

2. The Court's decision in *Hardt* will likely affect the analysis in this case. If the Court were to hold in *Hardt* that a plaintiff must be a "prevailing party" in order to obtain attorney's fees under ERISA, the mode of analysis would be identical in both cases, because the relevant inquiry in each instance would be whether a court-ordered remand works the "judicially sanctioned change in the legal relationship of the parties" necessary to confer "prevailing party" status. *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Indeed, in rejecting the plaintiff's motion for attorney's fees, the court of appeals in *Hardt*, much like the court of appeals in this case, ultimately held that the "remand order did not satisfy the requirements of *Buckhannon*" on the ground that the order "did not *require* [the plan administrator] to award benefits to [the plaintiff]." Pet. App. at 10a, *Hardt*, *supra*; cf. Pet. App. 15a, 18a (holding in this case that "[t]he order remanding to the agency is alone not enough to establish the needed imprimatur" on the

ground that "[t]he court did not order [the agency] to do anything").

The Court's resolution of the second question presented in *Hardt*, therefore, will likely have a direct bearing on the correct analysis in this case. Specifically, should the Court hold that the plaintiff in *Hardt* qualifies as a "prevailing party" by virtue of the court-ordered remand, it would be difficult not to reach the same conclusion concerning the petitioner in this case, because the Court has made clear that the phrase "prevailing party" is a "legal term of art" that should be construed consistently across different fee-shifting statutes. *Buckhannon*, 532 U.S. at 603 & n.4. Indeed, insofar as petitioner expressly *sought* a remand in his original complaint, he arguably has an even more compelling claim for "prevailing party" status than the plaintiff in *Hardt*. Compare C.A. App. 57 with Pet. App. at 10a-11a, *Hardt*, *supra*.

In addition, if the Court were to hold in *Hardt* that a plaintiff need not be a "prevailing party" in the first place in order to obtain attorney's fees under ERISA, the Court may at that point wish to revisit whether to grant certiorari in this case. As the Court's grant of certiorari on the second question presented in *Hardt* reflects, there is uncertainty in a variety of factual contexts as to whether (and, if so, under what circumstances) a court-ordered remand gives rise to "prevailing party" status for fee-shifting purposes. See Pet. 18-21. Regardless of the extent of the circuit conflict on the specific facts presented in this case, that broader uncertainty may justify further review.

3. It has been this Court's practice to hold a petition for rehearing on its docket during the pendency of a case raising a related issue. See, *e.g.*, *Day* v. *McDonough*, 547 U.S. 198 (2006), pet. for reh'g denied, 549 U.S. 1261

(2007); see generally Eugene Gressman et al., *Supreme Court Practice* 818-821 (9th ed. 2007). Accordingly, in light of the potential impact of *Hardt* on the appropriate disposition of this case, we respectfully submit that the most prudent course at this juncture is to hold this petition for rehearing pending the decision in *Hardt*. Should the Court do so, petitioner will file a supplemental brief immediately following the decision in *Hardt* with a recommended disposition of the petition for rehearing and the underlying petition for certiorari.

* * * * *

The petition for rehearing should be held pending the Court's decision in *Hardt* v. *Reliance Standard Life Insurance Co.*, No. 09-448, and then disposed of accordingly.

Respectfully submitted.

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CERTIFICATION OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in this Court's Rule 44.2.

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